No. 72-2062

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HONORABLE C. WILLIAM O'NEILL,
Chief Justice of the Supreme Court
of Ohio, et al.,
Petitioners,

vs.

HONORABLE FRANK J. BATTISTI, Chief Judge
of the United States District Court for
the Northern District of Ohio,
Respondent.
George S. Heitzler, Jr.,
Intervenor.

ORDER

Filed
Nov. 13, 1972
James A. Higgins, Clerk

Before: PHILLIPS, Chief Judge, MILLER and LIVELY, Circuit Judges.

Upon consideration, IT IS ORDERED that the motion of Intervenor, George S. Heitzler, Jr., to stay the execution and enforcement of the order of this Court of November 10, 1972, granting a writ of mandamus, be and hereby is denied.

Entered by order of the Court.
JAMES A. HIGGINS, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DANIEL T. TAYLOR, III, et al.,
Plaintiffs

v.

KENTUCKY STATE BAR ASSOCIATION,
et al., *Defendants*

Civil Action No. 6171

MEMORANDUM AND ORDER

Pursuant to the mandate of the Sixth Circuit Court of Appeals (C.A. No. 19718, March 26, 1970), this cause was remanded this Court for an evidentiary hearing, to determine whether or not the defendant Kentucky State Bar Association was motivated by "bad faith" in the institution of disbarment proceedings against the plaintiff, attorney Daniel T. Taylor, III. In the words of the Sixth Circuit:

> If the appellants can bear the "heavy burden" of showing that the Bar Association proceedings were instituted deliberately to suppress First Amendment rights, and if the appellants can overcome the strong presumption that the Bar Association's motive was to enforce its canons of ethics, then the District Court can frame an appropriate remedy against the Bar Association by enjoining further grievance proceedings and preventing the Bar Association from presenting any recommendations to the Court of Appeals of Kentucky. 424 F. 2d 478, 482.

The court reasoned that if such a burden could be met, if bad faith proceedings without hope of ultimate success, calculated only to harass, could be shown, then a federal injunction could issue under 42 U.S.C. §1983 and the doctrine of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) in order to prevent a "chilling effect" upon the exercise of First Amendment rights by plaintiff Taylor and other Kentucky lawyers, who, like Taylor, are inclined to represent controversial clients.

Accordingly, plaintiff Taylor was granted a full evidentiary hearing in this court, which lasted from the

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morning of July 6, 1971, until the evening of July 9, 1971. Some fifty (50) or more witnesses testified at said hearing, and extensive exhibits, including in camera transcripts of proceedings in other disciplinary matters, were filed. The Court has duly considered the transcript of that hearing (875 pages) and the briefs submitted by both parties.

A chronology of the K.S.B.A. disbarment proceedings can be stated fairly succinctly. In May of 1967, complaints about attorney Taylor began coming to the attention of the Bar Association Board of Governors. An investigation of said complaints by Mr. Henry Harned (Director of the Kentucky Bar Association) and members of his staff (Mr. Paul Mahoney and Mr. James Higgs) resulted in a nine (9) count charge being preferred against Taylor on July 29, 1968. The charge included neglect and abandonment of a client, assault and battery upon a fellow attorney, intimidation of a witness, the deceitful presentation of persons other than the actual defendant in court, and five more counts involving contempt of court in the Geary murder trial. Two months after the charge was filed, on September 20, 1968, the Board of Governors appointed a Trial Committee of three men (Pat Rankin, John Coleman, and Clyde Williams) to hear the charge in accord with rules of the Kentucky Court of Appeals. The Trial Committee held a three-day hearing at which all parties were represented by counsel and were granted the right to confront and cross-examine witnesses. The Trial Committee found plaintiff Taylor guilty on all nine (9) counts in a report to the Board of Governors and recommended a one-year suspension from practice. The Board of Governors subsequently, upon its con-

sideration of the Trial Committee report, dismissed (2) of the counts,[1] however still found Taylor "guilty" on the remaining (7), and increased the penalty recommended by the Trial Committee from a one to five-year suspension from the practice of law in Kentucky. Said penalty was then recommended by the Board of Governors in an advisory opinion to the Kentucky Court of Appeals,[2] which has not yet been acted upon by the Court.

In passing on the issue of the existence or non-existence of a "bad faith" prosecution, the role of a federal court is limited. Our function is not to weigh the evidence, nor to decide if attorney Taylor is, in fact, guilty of the charges; we rather must determine whether or not the record contains *any credible evidence* to support a finding of guilty. Only if the record is *totally devoid* of any such credible evidence to support a guilty verdict, can bad faith be presumed. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960-; *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969); *Cameron* v. *Johnson*, 390 U.S. 611 (1968). In Thompson (supra), the now-famous "Shuffling Sam" case, the Supreme Court fixed the boundaries of our inquiry to be:

> The ultimate question presented to us is whether the charges against petitioner were *so totally devoid of evidentiary support* as to render his conviction unconstitutional under the

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[1] Count 4 (accusing Judge Pound of disability from either medicine or alcohol); Count 6 (abandoned client).

[2] The Remand Order of the Sixth Circuit Court of Appeals incorrectly stated that "continuances, postponements and the initiation of this lawsuit have forestalled further action by the Trial Committee." 424 F.2d at p. 479.

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> Due Process Clause of The Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence but on whether this conviction rests on *any evidence at all.* 365 U.S. 199. (Emphasis added).

Only the total lack of evidentiary support for the finding of guilt can overcome the "strong presumption" that the sole motive of the defendant Bar Association was simply to enforce its canons of ethics, and thereby replace it with another presumption—that of "bad faith." Indeed, plaintiff Taylor bears a heavy burden of proof.

In an exhaustive sixty-page brief, plaintiff Taylor contends that there is a total lack of evidence to support a finding of guilty on any of the charges; that "bad faith" is also evident at all stages of the proceedings; and that the disciplinary actions were taken solely to harass plaintiff Taylor, i.e., punish him for representing controversial, unpopular clients and causes, and to deter other lawyers in Kentucky from practicing law in Taylor's fashion.

We cannot agree. A review of the record conclusively demonstrates credible evidence of a course and pattern of "unlawyerlike" and unprofessional conduct by attorney Taylor, which fully justifies the strong presumption that the defendant Bar Association was merely enforcing its own canons of ethics by which Taylor had agreed to abide when granted his license to practice law in Kentucky.

The evidence presented by plaintiff Taylor clearly failed to overcome the strong presumption of good faith. Although many witnesses testified that attor-

ney Taylor was an unorthodox, independent lawyer who devoted his practice almost exclusively to the representation of controversial, unpopular clients, *no casual link* between that (undisputed fact, and the disciplinary proceedings was ever shown. We are convinced that the defendant Bar Association disciplined plaintiff Taylor without regard to his clientele, and that like conduct in the defense of more "popular" clients would have resulted in the same disciplinary proceedings. The intent of the Bar Association was obviously to preserve the integrity of the legal profession, not to suppress Taylor's First Amendment freedoms.

Plaintiff's brief asserts that the "bad faith" of the defendant Bar Association becomes patent at four stages of the disciplinary proceedings; (1) Bias and incompetence in the investigation; (2) Denial of procedural due process at the hearing; (3) Bias in the actual voting by the Board of Governors; and (4) Unequal treatment as to the penalty imposed compared to prior cases. Each point must be analyzed separately.

Investigatory Stage

Plaintiff Taylor argues that the investigation prior to the filing of charges was the original and most blatant example of the "bad faith" prosecution, in that it was "grossly biased," "incompetent," and displayed the same "reckless disregard for truth" condemned by the Supreme Court in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967).

In support of these bold allegations, plaintiff submits that counts 6 through 9 were "secretly held in abeyance

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over the plaintiff's head for over a year," and then hurriedly investigated and preferred to supplement counts 1-5 which arose out of Taylor's conduct at the Geary murder trial. Further, it is argued that the facts were not thoroughly checked, and no effort was made to obtain evidence favorable to the plaintiff. Nothing in the record is more pertinent on this score than the direct examination of Mr. Henry Harned, Director of the Kentucky Bar Association, by plaintiff's attorney, William Kunstler. Mr. Harned, who was in charge of the investigation of palintiff Taylor, repeatedly testified that the K.S.B.A. took no action on counts 6, 7, 8, and 9 for about one year, because, as a matter of standard operating procedure, they had been referred to the Louisville Bar Association for investigation:

> "Q: Then, why, Mr. Harned, didn't you present counts 6, 7, 8, and 9, all of which were more than a year old; why didn't you present those if they were so serious to the Board of Governors prior to May 8, 1968, when you asked for permission to investigate them fully?"
>
> "A: I explained that this morning. They were submitted to the Louisville Bar for investigation by their committee and they were under investigation by the Louisville Bar. p. 131.
>
> * * *
>
> "[T]hey do an excellent job investigating cases down here; that it would take us months and months to accomplish and they know the people and they know the events as they occur and they do a fine job of investigating and reporting back to my office and that's been going on for years." p. 132. *Transcript of Proceedings*, Volume IV, pp. 131, 132.

Moreover, the testimony of Mr. Harned reveals a reasonably thorough investigation on the part of the defendant K.S.B.A as well. In regard to the "fake defendant" charge (count No. 9), the following colloquy appears in the transcript:

> "Q: And isn't it a fact, Mr. Harned, that you singled out Mr. Taylor because you weren't concerned with Mr. Tucker; he wasn't the object of what you wanted to get; isn't that correct?"
>
> "A: Oh, I had no choice except to apply the facts to Mr. Taylor."
>
> "Q: But you could have applied them though, to Mr. Tucker, just as well, couldn't you?"
>
> "A: Only from the newspaper account."
>
> "Q: Well, what else did you have about Mr. Taylor other than the newspaper account?"
>
> "A: Uh, the testimony of Judge Colson, and Mr. Riggs and Mr. Brammell, Officer Brammell." *Transcript*, Volume IV, p. 97.

In an effort to find the truth about the events that took place on that day of great confusion in City Police Court, Mr. Harned interviewed the Judge (Colson), the prosecutor (Riggs), and the police witness (Brammell). These men certainly were in a good position to know the events that transpired; they were present.

The "abandoned client" charge (count No. 6) arose out of an affidavit by Mrs. Ruby Orbison, the sister of the client who was allegedly abandoned, followed by a statement obtained from attorney Sidney Baer who replaced Taylor after the order of withdrawal was eventually entered. (See *Transcript*, Volume IV, pp.

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103, 107, 109). Both Mrs. Orbison and Mr. Baer were in a good position to know what transpired, and whether or not the client had been "abandoned"; they were present when the incident occurred.

Likewise, the charge of assault and battery (count No. 7) also arose out of a reasonably thorough investigation. Mr. Harned obtained the affidavit of Mr. John Tim McCall, the attorney who was physically attacked by attorney Taylor, and the statement of another attorney who was present when the incident occurred, Mr. Robert E. Fleming (who considered the conduct of attorney Taylor as "uncalled for and unbecoming a lawyer"), as expressed in Fleming's written communication to the Bar during its investigatory procedures.

Count No. 8, the "intimidation of a witness" (a female reporter), arose out of the same incident as the assault and battery charge, and was supported by the same investigation and evidence, (i.e., statements by attorneys McCall and Fleming).

Finally, counts 1-5 arose out of plaintiff Taylor's conduct at the Geary murder trial (April 29-May 3, 1968). Mr. Harned brought these charges only after an extensive interview with Judge J. Miles Pound (who held plaintiff Taylor in contempt of court), and after reviewing excerpts from the trial transcript, as well as numerous newspaper articles.

We find the nine counts of unethical conduct were brought against plaintiff Taylor only after a reasonably thorough investigation by the Louisville and Kentucky Bar Associations. There is no evidence herein to suggest that the Taylor investigation was any less competent or thorough than investigations of alleged unethical conduct by other attorneys in the past.

Finally, plaintiff contends that the investigatory staff failed to properly "verify"[3] the charges before formally preferring them to the Board of Governors. But such was not the case. The clear evidence in the record shows that each of the nine (9) counts were "verified" by affidavits, letters, or interviews, prior to July 19, 1968, when the Board of Governors authorized the filing of the 9-count charge. Counts 6-9 had been verified between May of 1967 and May 8, 1968. Counts 1-5 were verified (by an interview of Judge Pound) between May 8, 1968 (when the Geary murder trial ended) and July 19, 1968 (when the nine counts were filed). (See *Transcript of Proceedings*, Volume IV, p. 129).

We, therefore, conclude that no bias or incompetence existed in the investigation of plaintiff Taylor by the defendant Bar Association, and that said preliminary proceedings were conducted in good faith in an effort to uphold the canons of ethics.

Alleged Denial of Procedural Due Process at the Hearing

The second stage of the disciplinary proceedings at which plaintiff maintains "bad faith" existed was the "hearing stage." Plaintiff urges on brief that the refusal of the Trial Committee to allow a public hearing, their refusal to be examined as to bias, introduction of "editorialized excerpts" of the Geary trial, and the requirement that a guilty attorney pay all costs of disciplinary proceedings all constitute a denial of proce-

[3]A term required to mean "substantiated" as opposed to "sworn to" as there is no legal requirement of a formal swearing by everyone to everything in an investigatory process.

dural due process and hence "bad faith" on the part of the defendant Bar Association.

Once again, there is no merit to plaintiff's allegations.

The Sixth Amendment of the United States Constitution and the Kentucky Bill of Rights do guarantee the right of a public trial to the accused "in all *criminal prosecutions*". U.S.C.A. Amend. 6 (Emphasis added). Plaintiff Taylor, however, fails to cite any authority whatsoever for the idea that disbarment proceedings are in the nature of a "criminal prosecution." We hold that they are not, and, hence, no right of "public trial" exists under the Sixth Amendment. Disbarment proceedings are, rather, sensitive disciplinary matters, which, as a matter of public policy, should be conducted in private, in order to encourage potential witnesses to come forward as well as to protect the accused attorney from unnecessary publicity resulting from false or unproven assertions. A similar result was reached by a New York Federal Court in 1953, in *American Broadcasting Company* v. *United States*, 110 F. Supp. 374 (1953) in which the Sixth Amendment right to a public trial was held inapplicable to Federal Communications Commission license revocation proceedings. Said the court:

> "A finding by the F.C.C. that its rules had been transgressed would not amount to a conviction for a crime (citing cases) nor would the denial of a license to an applicant be punishment for a crime." 110 F. Supp. 374, 390.

We can detect no difference between the revocation of a license to operate a radio or TV station due to violation of F.C.C. Rules, (as in *A.B.C.*), and the suspen-

sion of a license to practice law due to the violation of the Bar Association canons of ethics (as in the case at bar). Neither proceeding is in the nature of a "criminal prosecution," and thus neither requires a public trial under the Sixth Amendment.

Likewise, disbarment proceedings are not the "criminal trials" covered by the *Sizemore* "conflict of interest" rule. In *Asher* v. *Mills*, 421 S.W.2d 79, the Kentucky Court of Appeals stated that rule quite clearly:

> "This court has long since decided in *Wagers* v. *Sizemore*, 300 S.W. 918, and *Roberts* v. *Noel*, 296 S.W.2d 745, that a decision whereby the decision-maker *in a criminal case* is paid only if the defendant is found guilty violates the Fourteenth Amendment to the United States Constitution." 421 S.W.2d 79, (Emphasis added).

Plaintiff argues that R.C.A. 3.460 is unconstitutional because the Bar Association is only reimbursed for its costs incurred in the disciplinary proceedings if the accused attorney is found guilty and then required to pay the costs incurred; maintaining such a rule allegedly creates a pecuniary conflict of interest. The cases cited by the plaintiff, however, (*Sizemore*, *Asher*, *supra*, and *Roberts* v. *Nell*, 296 S.W.2d 247 (1936)) are all distinguishable, because all involved *criminal trials*, in which either the judge or jury had a direct *personal* financial stake in the outcome of the trial. In the case at bar, we have no "criminal trial," and the triers of fact (K.S.B.A. Trial Committee and Board of Governors) have no direct *personal* financial stake in the outcome. Only the defendant K.S.B.A. itself must incur expenses for which it may be reimbursed (i.e., the K.S.B.A. Treasury); the individual members

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of the Trial Committee and Board of Governors are not required to expend personal funds for which they might hope to be reimbursed. Thus, plaintiff Taylor was not deprived of procedural due process by operation of R.C.A. 3.460.

Neither do we see a denial of due process in the introduction of certain excerpts from the Geary murder trial rather than the entire transcript. Plaintiff cites no case law authority to support said contention, and the rule cited, R.C.A. 3.380, is inapplicable. The *relevant rule*, R.C.A. 3.360, states that

* * *

> "Where, in any proceeding, evidence has been taken under oath, upon due notice to the Respondent, and at the taking of which Respondent has appeared, either in person, or by counsel, or as an attorney for any party, a duly certified transcript *of all, or the essential portions of* such proceedings may be used as evidence in any hearing provided for in R.C.A. 3.200 (Trial Committee Hearing) or in any investigation antecedent to or in connection with any disciplinary case involving the same charge growing out of matters connected therewith and such transcript and records, *or parts thereof* may be made a part of the record on any hearing or investigation." (Emphasis added).

The Rules of the Kentucky Court of Appeals thus clearly allow the introduction of excerpts and portions of transcripts of other proceedings which are relevant to the disbarment proceedings. Plaintiff Taylor fails to cite any authority for the assertion that such a rule is violative of due process of law, and the thought that the excerpts may have been "editorialized" by the court

reporter is mere conjecture and wholly without evidentiary support.

Finally, no denial of due process is seen in the refusal of the defendant Trial Committee to allow themselves to be examined as to possible bias on their part.

Plaintiff argues that under the rule of *Osborne* v. *Bullitt County Board of Education*, 415 S.W.2d 607, (1967), the dual role of the defendant K.S.B.A. required such an examination. But *Osborne* does not apply. There, the School Board constituted the last step in the administrative process; herein, the Kentucky Court of Appeals is the final judge of the fairness of the disbarment proceedings by the Trial Committee and Board of Governors. As the last rung in the administrative ladder, the Court of Appeals is charged with the discovery of any possible bias, or caprice along the line. Moreover, the Rules of the Court of Appeals make no provision for the examination of Trial Committee members for possible bias.

The hearing stage is also attacked by plaintiff Taylor in the allegation that the Trial Committee Report contains no credible evidence to support any of the nine counts of unethical conduct lodged against him.

Counts 1-5 (contempt of court in the Geary murder trial) should all be totally excused, it is submitted, because the judge involved was under the influence of alcohol during the trial.[4]

No one can read the Geary trial excerpts without rejecting such an argument. Attorney Taylor did not

[4]A charge never proven conclusively.

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even put the matter of Judge Pounds' physical condition into issue until the afternoon of May 3, 1968, the last full day of testimony. All of the other contempt incidents occurred prior in time to the allegation that Judge Pound was under some physical disability and were wholly unrelated to said alleged condition.

Even the most cursory reading of the Geary trial proceedings reveals a pattern of conduct by attorney Taylor that can only be characterized as contemptuous and reprehensible. We could easily cite numerous portions of the Geary transcript to prove our point, but we decline to do so. Our function here is not to try the merits of this case, or to determine the guilt or innocence of attorney Taylor; our function is to simply determine if credible evidence exists in the record to support a finding of guilt. Suffice it to say we find credible evidence in the Geary transcript *more than sufficient* to justify a guilty verdict on counts 1, 2, 3, and 5 of the Taylor charge.

Likewise, a guilty verdict on counts 7, 8, and 9 are also supported by substantial credible evidence. (See *Transcript of Proceedings*, Volume II, pp. 61-73, Volume IV, pp. 79, 80, 95).

In reference to the "fake defendant charge" (count 9), although Police Judge Colson saw no fraud *at the time* (*Transcript of Proceedings*, Volume I, p. 68) in that he was aware of no legal rule against testing the identification of defendant by police, such a practice constitutes the perpetuation of a fraud upon a court in violation of canon seven of the Canons of Ethics of the American Bar Association.

Reiterating that we leave the merits of this case to the Kentucky Court of Appeals, we conclude that, as

a matter of law, substantial credible evidence exists in the record to support a finding of guilty by the defendant K.S.B.A. Board of Governors on counts 1, 2, 3, 5, 7, 8, and 9 of the 9-count charge.

Consequently, we find no denial of due process, bias or bad faith in the hearing stage of the Taylor proceedings.

Alleged Bias in the Voting by Board of Governors

The substance of this point is that four (4) members of the Board of Governors who *did not vote* on plaintiff Taylor's guilt or innocence on March 20, 1970, *did vote* on punishment the next day, March 21, 1970.

Although such a procedure may be somewhat unusual, legitimate reasons explain the occurrence. According to the record, two of the men involved, Mr. Allen Schmitt and Mr. E. Gaines Davis, were members of the Kentucky General Assembly at the time and were appearing that afternoon before some legislative committee (the day of the vote on guilt or innocence). Two others, Anthony Hellmann and Lloyd Cardwell, abstained from voting on guilt or innocence because they were members of the Louisville Bar Association, and were so "close" to the case. (See *Transcript of Proceedings*, Volume IV, pp. 146, 147).

Thus, each of the four men involved had a legitimate reason for not voting on plaintiff Taylor's guilt or innocence and then voting on the punishment the next day. Certainly, the failure to vote on guilt or innocence was no waiver of the right to vote on penalty.

Moreover, the votes of the four Board members involved had no effect on either the find of guilt or the

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penalty recommended. The findings of guilt were by clear majorities on seven counts of the 9-count charge. The penalty vote resulted in eleven (11) votes for a 5-year suspension, two (2) votes for total disbarment, and one (1) vote for a 2-year suspension. Even if the four Board members referred to *did not vote at all*, nine (9) votes for *at least a five-year suspension* would remain, constituting a majority of the seventeen (17) Board members eligible to vote.[5]

Indeed, every member of the Board of Governors, save one, voted for *at least* a five-year suspension. (See *Tally Sheet*, plaintiff's Exhibit 9).

Contrary to showing bias, the voting of the Board of Governors reveals careful thought and independent judgment. Although the Trial Committee found plaintiff Taylor guilty on all nine(9) counts of the charge, the Board of Governors found plaintiff "not guilty" on count No. 4 (accusing Judge Pound of drunkenness in court) and count No. 6 (the abandonment of a client).

Credible evidence is thus evident in the record to support that the voting of the Board of Governors was conducted in good faith, and no evidence of the plaintiff rebuts this presumption of regularity.

Penalty Stage

Plaintiff's final argument is that the 5-year suspension recommended by the defendant K.S.B.A. is an

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[5]"R.C.A. 3.390: * * * Both the finding of guilt and the disciplinary action to be recommended must be agreed upon by a majority of the members of the Board entitled to vote in disciplinary proceedings."

unduly harsh penalty which denies him equal protection and again shows bias and bad faith.

Again, we cannot agree. The submitted *in camera* case[6] is not analogous to the case at bar in any sense of the word. There, an attorney was investigated on a single charge (i.e., destruction of evidence) growing out of a single event; whereas, nine (9) charges were lodged against attorney Taylor, growing out of numerous incidents over a period of time.

Plaintiff also cites numerous Kentucky cases which allegedly resulted in more lenient penalties for an equal quantum of guilt.

The Court has read and analyzed all of the cited cases,[7] and we find none of them in point. While we do not feel compelled to distinguish each of the cases and all of their factual nuances, we conclude generally that none of the cited cases involved the pattern of conduct over a period of time resulting in nine charges. Rather, the cited cases dealt with fewer, usually less serious charges flowing from a single incident.

Again we hasten to add that the Kentucky Court of Appeals is the final arbiter in these disciplinary proceedings; they will make the final decision on the fairness of the recommended 5-year suspension. We can detect no unequal treatment, bias or bad faith in that recommendation.

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[6]By order of this Court, identification of the in camera case, or its parties, is prohibited.

[7]*In Re Lewis*, 282 S.W.2d 321; *In Re Gordon*, 402 S.W.2d 854; *In Re Allen*, 212 S.W.2d 328; *In Re Vaughn*, 369 S.W.2d 14; *In Re Bentley*, 201 S.W.2d 712; *In Re Cohen*, 187 S.W.2d 833; *In Re Carroll*, 406 S.W.2d 845.

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Conclusion

Plaintiff urges that we look to the "totality of circumstances"[8] to determine whether or not the defendant K.S.B.A. conducted "bad faith" disbarment proceedings, designed deliberately and solely to suppress his First Amendment rights. This, we certainly have done. And, a careful analysis of the record (1,000 pages of Trial Committee Proceedings, 800 pages of Proceedings of the Evidentiary Hearing before this Court, Briefs and Exhibits) leads us to the inescapable conclusion that there is substantial credible evidence to support the finding of guilty by the defendant K.S.B.A., and that the sole motive of the defendant was to enforce its own canons of ethics, so vital to the integrity of the legal profession. Plaintiff Taylor's allegations of bias and bad faith at the investigation, hearing, voting and penalty stages of the proceedings are unfounded and unsupported by the evidence and fail to overcome the strong presumption of regularity and good faith on the part of the defendant Kentucky State Bar Association.

After pretrial, trial, briefing, and submission of this action following its remand to us by the Sixth Circuit; in fact, as late as January 2, 1972, when we were actually engaged in preparing this Finding, the plaintiff Taylor tendered to us a supplemental complaint, seeking thereby to add a new plaintiff (one Tinsley) and a new defendant in the person of Judge John P. Hayes of the Jefferson Circuit Court. The allegations of the tendered document have nothing whatsoever to do with the controversy here tried, briefed, and sub-

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[8] *Sobel* v. *Perez*, 289 F.Supp. 392 (E.D. La. 1968).

mitted; stemming rather from a performance by the plaintiff Taylor and the punishment he received therefor following a criminal proceeding in the Jefferson Circuit Court, arising long after our trial of the instant action. Those allegations are in and of themselves, if they be anything, a separate and distinct matter, not related in time, substance, or identity to the issues now before us. The motion to file such supplemental complaint is OVERRULED. *U. S.* v. *South Pacific Co.*, 75 Fed. Supp. 336.

WHEREFORE, the plaintiff's action is dismissed at plaintiff's costs, and the Kentucky State Bar Association is accordingly hereby relieved of its self-imposed inhibitions against further proceedings to discipline Daniel T. Taylor, III.

January 14, 1972

JAMES F. GORDON
United States District Judge

Copies to:
Counsel of record

Entered
Jan. 14, 1972

BARBARA D. SPAIN
Deputy Clerk
August....., Clerk

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In the Supreme Court of the United States

October Term, 1972

No. 72-1091

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Petitioner,

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUGGESTION OF MOOTNESS AND BRIEF IN OPPOSITION OF RESPONDENT JUSTICES OF THE OHIO SUPREME COURT

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OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported in 33 Ohio Misc. 137 (Vol. XLVI, No. 3 of the *Ohio Bar*, dated February 19, 1973).

RELEVANT STATUTORY PROVISIONS

Certain statutory provisions are relevant in addition to those cited by petitioners. The following sections of Title 28 of the United States Code are relevant:

> § 1391. (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

§ 1651. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The following sections of the Ohio Revised Code are also relevant:

§ 2503.10 The clerk of the supreme court shall keep his office at Columbus, in the rooms provided for that purpose. He shall be furnished by the state with all necessary printing, books, blanks, stationery, and furniture.

§2503.32 The records and papers pertaining to the business of the supreme court shall be kept in the rooms provided for the court. They shall not be removed therefrom unless by direction of the court, and then only so long as its business requires.

§2503.33 The chief justice and the judges of the supreme court shall meet at Columbus on the first Tuesday after the first Monday of January of each year to hold a term of court.

QUESTIONS PRESENTED

The first question sought to be raised by petitioner is not presented on the record. Accordingly, the first question must be rephrased as follows:

1. Did the Court of Appeals properly enter an order under 28 U.S.C. § 1651 directing the District Court to vacate its temporary restraining order, entered without hearing and without notice, which prevented the Ohio Supreme Court "from taking any further action in disciplinary proceedings against" petitioner which were then pending before it?

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COUNTERSTATEMENT OF CASE

Respondent Justices of the Ohio Supreme Court present the following facts in addition to those set out by the Petitioner in his Statement of the Case:

Following the filing with the Ohio Supreme Court on September 1, 1972 of the recommendations of the Board of Grievances and Discipline, the Supreme Court set the matter for hearing on October 10. At the request of petitioner, the hearing date was continued to November 15, 1972.

After Judge Peck entered his Stay of the District Court's Temporary Restraining Order on October 27 (Pet. 10), petitioner filed a far-ranging brief of 35 pages in support of a motion to dissolve that stay which, in addition, expansively canvassed the merits of respondents' mandamus petition. Accordingly, while the Sixth Circuit's Order of November 10 was prior to the date it had originally scheduled for hearing on the petition, the Order was entered only after it had had an opportunity to review petitioner's extensive brief.

The Order actually entered by the Sixth Circuit on November 10 appears at Pet. App. A-46, A-47 and for convenience is quoted here in full:

> "The United States District Court for the Northern District of Ohio is directed:
>
> "(1) To vacate and withdraw the temporary restraining order of October 25, 1972, enjoining the Ohio Supreme Court from taking any further action in disciplinary proceedings against Judge George S. Heitzler, Jr. and from enforcing the order of the Supreme Court of September 8, 1972; and

"(2) To dismiss the action filed by Judge Heitzler against the Justices of the Supreme Court of Ohio, No. C72-1140, for lack of venue."

It is important to note, in view of the first question sought to be presented by petitioner, that dismissal of the action was directed solely on the grounds of lack of venue. The only order resulting from application of the abstention doctrine and federal principles was the direction that the lower court's temporary restraining order preventing the Ohio Supreme Court from taking further action be vacated.

Following the Sixth Circuit's entry of its November 10 Order, the Ohio Supreme Court did go forward with the scheduled November 15th hearing in petitioner's disciplinary proceeding and, on December 15, 1972, issued a 19 page opinion confirming the recommendations of the Board and ordering petitioner indefinitely suspended from the practice of law. That opinion, *Cincinnati Bar Association v. Heitzler,* appears in 32 Ohio St. 2d at 214 and is set out as an appendix to this brief. When that opinion is compared with petitioner's federal court complaint (Pet. App. A-1 - A-29), it becomes clear that petitioner raised before the Ohio Supreme Court, and that the Ohio Supreme Court considered, essentially all of the issues underlying his 42 U.S.C. § 1983 federal complaint.

Petitioner thereafter asked the Ohio Supreme Court for a stay of its order, which was denied on January 12, 1973, pending the filing of a petition for a writ of certiorari in this Court, so it is to be presumed that on or before its March 15, 1973 due date petitioner will file such a petition with this Court asking for direct review of the Ohio Supreme Court's December 15 decision. Petitioner is thus, by this petition, in the anomalous position of seeking to obtain collateral review of his claims before he has sought direct review of them.

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ARGUMENT

1. The first question sought to be presented by petitioner is moot and, in any event, was correctly decided under settled principles.

In his first question, petitioner attempts to raise the issue whether the Sixth Circuit improperly divested the court below "of its lawful and proper jurisdiction already assumed in a federal civil rights suit." But the only "jurisdiction," lawful, proper, assumed or otherwise, of which the Sixth Circuit divested the District Court, was its "jurisdiction" to enforce "the temporary restraining order of October 25, 1972," entered without notice or hearing, "enjoining the Ohio Supreme Court from taking any further action in disciplinary proceedings against Judge George S. Heitzler, Jr." But there is now no further action for the Ohio Supreme Court to take. It has completed its action with respect to the disciplinary proceedings against petitioner. It has handed down its final judgment confirming the recommendations of the Board and ordering petitioner indefinitely suspended from the practice of law. There is nothing more for it to do. Accordingly, the first question sought to be presented is moot.

In any event, paragraph one of the Sixth Circuit's November 10 Order was clearly in accordance with applicable law and usages approved by this Court. This Court has recently emphasized "the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster*, 407 U.S. 225, 243 (1972). Petitioner's anemic claim below that the Board's charges infringed his freedom of association in choosing his luncheon companions (Pet. App. A-17), which is the only factual allegation made in the complaint of interference with First Amendment freedoms, was certainly

inadequate to invoke the narrow exception of *Dombroski v. Pfister*, 380 U.S. 479 (1965), as further explicated in *Younger v. Harris*, 401 U.S. 37 (1971), which decisions are applicable because of the "quasi-criminal" character of bar disciplinary proceedings. *In re Ruffalo*, 390 U.S. 544, 551 (1968). Such an allegation, at most, suggests an incidental "restriction of plaintiff's business and social activities," which is not the sort of irreparable injury to vital First Amendment freedoms which permits federal intervention. *Shaw v. Garrison*, 293 F. Supp. 937, 950 (E.D. La.), *aff'd per curiam* 393 U.S. 220 (1968).

There was no absence of "an opportunity to raise his constitutional claims" in state court, *Younger v. Harris*, *supra*, 401 U.S. at 49, for they not only could have been, but were, raised in the Ohio Supreme Court, and will almost certainly be raised here on a petition for direct review of the Ohio Supreme Court's decision. Nor were there any allegations that the proceedings against petitioner were brought "with no intention of pressing the charges or with no expectation of obtaining" relief, *Cameron v. Johnson*, 390 U.S. 611, 619 (1968); indeed, the fact that petitioner was indefinitely suspended from the practice of law shows that the proceedings against him were not pretensive or frivolous but were brought in good faith to achieve relief authorized in such proceedings. No conflict of circuits is alleged, and petitioner's strained attempt (Pet. 26) to distinguish *Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir.), *cert. denied*, 93 S. Ct. 126 (1972) indicates that the Second Circuit is fully in accord with the Sixth Circuit on the issue presented.

Surely a state's concern with the integrity of its bar is as subject to deference by the federal judiciary as were the oil and gas regulatory policies which counseled federal abstention in favor of state court decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

Mandamus was a proper remedy, not only as "the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations," *Will v. United States*, 389 U.S. 90, 95 (1967), but also as a wise and necessary exercise by the Sixth Circuit of its supervisory control over the district courts within its jurisdiction, *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957). The writ issued by the Sixth Circuit was fully consonant with and required by this Court's decisions counselling respect for state court proceedings in sensitive areas of federal-state relations.

2. The Sixth Circuit's decision ordering the complaint below dismissed for improper venue was a routine application of settled law, presenting no question of importance for this Court.

The Sixth Circuit ordered that the complaint be dismissed because venue was improper under 28 U.S.C. § 1391(b). It first held that the official residence of the Justices of the Ohio Supreme Court was Columbus, Ohio, in the Southern District of Ohio. This decision was clearly correct in light of O.R.C. §§ 2503.10, 2503.32, 2503.33 (p. 2, *supra*) and 2503.34 (Pet. 4), but whether it was or was not correct, this Court has many times said that it does not sit to pass judgment on the resolution of state law questions by the Circuit within whose jurisdiction the state is located. E.g., *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-08 (1949). Since for federal venue purposes, the official residence of all defendants was solely in the Southern District, and since they were manifestly sued in their official capacity, the Sixth Circuit quite correctly and routinely held that venue was improper in the Northern District of Ohio under 28 U.S.C. § 1391(b), and that 28 U.S.C. § 1392(a) had no application.

Accord, e.g., *United Office & Professional Workers v. Smiley*, 75 F. Supp. 695, 699 (E.D. Pa. 1946). In any event, *all* respondents could have been reached in a single action in the Southern District. The cases hold that § 1392 (a) has no application in such circumstances. *Hawks v. Maryland & Penn. R. Co.*, 90 F. Supp. 284 (E.D. Pa. 1950), *followed, Johnson v. B. G. Coon Construction Co*, 195 F. Supp. 197 (E.D. Pa. 1960).

The District Court, in issuing its *ex parte* temporary restraining order, had flagrantly disregarded applicable federal principles. This precipitous and improvident action had created circumstances which were "both exceptional and extraordinary" (Pet. App. A-47). The Court of Appeals, which had the case before it and was therefore required to issue some extraordinary relief, properly also took action in respect of the lack of venue, since any further proceedings in the United States District Court for the Northern District would have been a nullity. As the Court of Appeals indicated, there was precedent for this use of the All Writs Act. *Holub Industries, Inc. v. Wyche*, 290 F.2d 852 (4th Cir. 1961). Since petitioner's residence was in the Southern District as was the official residence of all respondents, and since no statute of limitations problems were present, the Sixth Circuit acted within its discretion in ordering dismissal rather than transfer under 28 U.S.C. § 1406(a). See, e.g., *Optico Corp. v. Standard Tool Co.*, 285 F. Supp. 46, 50 at note 4 (E.D. Pa. 1968).

CONCLUSION

The first question sought to be presented is moot. The decision below correctly applied settled principles and no conflict of circuits or other reasons exist which occasion intervention by this Court. It will be time enough to consider whatever validity, if any, petitioner's underlying constitutional claims may have when he seeks direct review of the Ohio Supreme Court's December 15 decision ordering him indefinitely suspended. The present petition should be denied.

Respectfully submitted,

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APPENDIX

Opinion of the Supreme Court of Ohio in the Case of Cincinnati Bar Association v. Heitzler

[Cite as Cincinnati Bar Assn. v. Heitzler (1972), 32 Ohio St. 2d 214.]

[214]

Attorneys at law—Misconduct—Disciplinary action—Indefinite suspension from practice of law—Acts warranting.

(D. D. No. 72-3—Decided December 15, 1972.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

Respondent, an attorney at law duly admitted to practice in Ohio, was appointed Judge of the Cincinnati Municipal Court on February 15, 1963, which office he continued to hold until after being unsuccessful in the ensuing election. Respondent was again appointed Judge of the Cincinnati Municipal Court on March 23, 1964, was thereafter elected and re-elected. He continued to hold said office until January 5, 1969. At that time he assumed, by election, the office of Judge of the Court of Common Pleas of Hamilton County, Division of Domestic Relations.

[215] On August 16, 1971, the Cincinnati Bar Association filed a complaint with the Board of Commissioners on Grievances and Discipline, charging respondent with violations of the Canons of Judicial Ethics. On October 4, 1971, the bar association filed a supplemental complaint, charging respondent, through his counsel, with attempting improperly to influence the course of the disciplinary proceedings.

On December 16, 1971, the matter was heard before a panel of three members of the Board of Commissioners. The hearing consumed six days over an extended period of time, ending on January 7, 1972, during which the panel heard by testimony or stipulation, more than fifty witnesses, and received forty-seven documents in evidence. On August 4, 1972, the panel submitted its findings of fact and recommendations to the secretary of the Board of Commissioners, which findings and recommendations were thereupon reviewed and adopted by the Board of Commissioners, and were filed with this court on September 1, 1972.

The complaint of relator set forth eleven counts of alleged violations of the Canons of Judicial Ethics. Respondent's answer admitted many of the factual allegations of the complaint, but denied any misconduct or any violation of the Canons of Judicial Ethics.

The first count alleged that while respondent was separated from his first wife, from the latter part of 1969 until September 1970, one Carol Chasteen (now respondent's second wife) was present frequently in his apartment, and that their conduct "was such as to cause members of the apartment complex and others to believe that they were living together." Respondent contended that he employed Miss Chasteen "as an attendant for respondent's afflicted son" and that he "did not violate any judicial canon and did not live with the said, Carol Chasteen," but he did not specifically deny that their conduct was such as to give the impression alleged. Respondent was separated from his first wife in early 1969, and executed a separation agreement **[216]** with her in January, 1970. She obtained a Mexican divorce from him in October, 1970, and respondent and Miss Chasteen were married in November, 1970, both occurring subsequent to respondent's

voluntary appearance before a committee of relator to testify concerning his personal conduct. The board found that the evidence sustained the allegations of this count.

The second count alleged that respondent took an Ohio Bar Association trip to Majorca, Spain, in October 1969, accompanied by Miss Carol Chasteen, at his expense, and that during that trip his conduct "was offensive to other members of the Ohio Bar Association and their wives." Respondent admitted making the trip to Majorca, but denied engaging in any offensive conduct during the trip, and denied violating any canon of judicial ethics in connection therewith. The board, although finding evidence of questionable conduct, found the evidence to be "equally balanced as to whether respondent's conduct was excessive for such an outing or essentially different from that of the ordinary person" and thus found that the evidence did not support a finding against respondent upon this count.

The third count alleged that respondent also took two trips to Mexico with Miss Chasteen, which was admitted by respondent, but he denied engaging in any course of offensive conduct. This count was dismissed by the panel.

The fourth count alleged that respondent, while a judge, was observed in a downtown Cincinnati hotel in a state of intoxication, and conducting himself in a loud and offensive manner. Respondent, while admitting to having been at the hotel on occasion, denied ever conducting himself in a loud or offensive manner, or that he ever conducted himself "in any manner, save and except, that in keeping with his elected position." The board found that the evidence "fell far short" of sustaining the allegations of this count.

The fifth count alleged that respondent engaged in immoral conduct at a downtown Cincinnati hotel, which

was denied by respondent, who demanded "strict proof thereof." [217] The board found the evidence insufficient to sustain the allegations of this count.

The sixth count, which alleged impropriety by respondent in connection with his first wife's obtaining the Mexican divorce, was dismissed by the panel.

The seventh count, which alleged that respondent's personal financial investments in Harmony Loan Company, a Kentucky corporation, were in direct circumvention of Kentucky law, was dismissed by the panel for lack of sufficient evidence.

The eighth count alleged that respondent was guilty of misconduct in connection with his association with the Harmony Loan Company and its officers and directors. Respondent admitted the factual allegations of this count, but specifically denied that he violated any canon of judicial ethics in connection therewith. The board made a finding of misconduct in connection with this charge.

The ninth count alleged that respondent, while a judge of the Cincinnati Municipal Court, and a director of Harmony Loan Company, signed 487 orders in 357 cases wherein Harmony Loan Company was a party. Respondent denied this count "for want of knowledge," and contended that the count could not be considered for the reason that the acts involved did not occur within respondent's current term of office. At the hearing, respondent admitted signing numerous orders in cases brought by Harmony Loan Company while he was both a judge and a director of that corporation, but contended that these involved only default judgments, confessions of judgment, garnishments and motions, that they did not involve any contested matters, and that they were only ministerial acts. The board made a finding of misconduct in connection with this count.

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The tenth count alleged misconduct by respondent in hiring as a constable a man with a lengthy criminal record, who was subsequently discharged because of alleged bribery attempts on his part. Respondent admitted hiring the employee knowing of his criminal record and discharging him **[218]** under the circumstances alleged, but contended that the employee was "in a menial, non-sensitive position" and that he was hired and retained "for many reasons other than political." The board made a finding of misconduct in connection with this count.

The eleventh count alleged that respondent hired his son and daughter to work in the Court of Domestic Relations. Respondent admitted these allegations, but denied any misconduct or violation of the Canons of Judicial Ethics in connection therewith. The board concluded that, although "such employment may technically amount to nepotism, the board believes that such employment did not amount to an intentional exploitation of nepotism."

The Board dismissed the supplemental complaint, finding that the evidence failed to establish "that respondent directed the actions of his counsel which led to the filing of the supplemental complaint."

The board found respondent to have violated Canons 4, 12, 13, 25, 26, 29, 33 and 34 of the Canons of Judicial Ethics adopted by this court, concluded "that respondent over an extended period of time has displayed continuing indifference to the Canons of Judicial Ethics, 'as a proper guide and reminder for judges,' " and recommended that respondent be suspended for an indefinite period from the practice of law.

The respondent not only filed objections to the findings and recommendations of the Board of Commissioners on Grievances and Discipline, but also filed a motion to quash and dismiss those findings and recommendations,

and to dismiss and recuse each and every member of the board.

Following the filing of the findings of fact and recommendations by the Board of Commissioners on Grievances and Discipline, this court authorized and directed the Chief Justice to order respondent to hear no further cases or other matters and to perform no other judicial duties until a decision is rendered in this matter. (*Cincinnati Bar Assn. v. Heitzler* [1972], 31 Ohio St. 2d 187.)

The cause is now before this court for consideration **[219]** of the report of the board and the objections and motions of the respondent.

Mr. R. O. Klausmeyer, Mr. John J. Getgey and *Mr. C. Donald Heile,* for relator.

Mr. Stanley E. Preiser, Mr. John B. Carrico and *Mr. David C. McCue,* for respondent.

Per Curiam. Respondent alleges that his constitutional rights were violated and he was denied due process of law by the Board of Commissioners on Grievances and Discipline, contending that his counsel was denied the right to file a brief on the merits with the hearing panel; that a witness for relator and a member of the board sat with the board when they discussed this case and made their findings and recommendations; that he was denied the right to be heard by the board; that the board made its findings and recommendations without "an indepth review of the transcript of testimony and the exhibits"; that three members of the board had heard evidence against respondent in another proceeding; and that the board proceeded under Gov. R. V rather than Gov. R. VI.

A review of the record indicates that the proceedings of both the board and the hearing panel were conducted in accordance with Rule V of the Rules For The Government

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Of The Bar Of Ohio (formerly Rule XVIII of the Rules Of Practice).

While there was some confusion as to the time for filing briefs with the hearing panel, respondent was not prejudiced in this regard. The hearing panel and the board determined the matter prior to the actual filing of briefs by either relator or respondent. Furthermore, Gov. R. V confers no right upon either relator or respondent to file briefs before either the hearing panel or the board, and the filing of same is a matter within the discretion of the board or hearing panel. Respondent was given every opportunity to present any relevant evidence that he desired to present to the hearing panel.

[220] Although a member of the board was a witness for the relator, the minutes of the board clearly indicate that such member "took no part in the discussion or voting" in the case.

Respondent was given a full and complete hearing before the hearing panel. Gov. R. V does not provide for an additional hearing before the entire board where the matter has been heard by a hearing panel. Neither does that rule, nor due process, require that each member of the board make "an indepth review of the transcript of testimony and the exhibits." The fact that three members of the board may have heard evidence against respondent in another proceeding does not disqualify them as members of the board. There is no indication that the findings and recommendations of the board herein were not predicated upon the complaint of relator, the answer of respondent, and the testimony and exhibits received in evidence before the hearing panel. Furthermore, there could be no prejudice to respondent in any event, since the action of the board was unanimous.

In addition, it is this court and not the board that makes the ultimate conclusion, both as to the facts and as to the action, if any, that should be taken. As stated in *Mahoning County Bar Assn. v. Ruffalo* (1964), 176 Ohio St. 263:

> "In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this court. However, this court has full responsibility for determining what the facts are and what action should be taken on those facts."

That both the hearing panel and the board afforded respondent a fair consideration and determination of the issues is shown by their action with regard to Counts 2, 3, and 11 of the complaint. The evidence clearly is sufficient to support a finding of misconduct with respect to all three counts. Yet, the hearing panel dismissed Count 3, and both **[221]** the hearing panel and the board found the evidence to be insufficient to support a finding of misconduct with regard to Counts 2 and 11.

Canon 4 of the Canons of Judicial Ethics requires that a judge's personal behavior in his everyday life "should be beyond reproach." Respondent admitted that he, while still married to, but separated from, his first wife, took his "girl friend" (now his second wife) with him, at his expense, on the trip to Majorca and on the two trips to Mexico, but he testified that they did not occupy the same room on any of the trips. Such conduct is not behavior beyond reproach within the meaning of Canon 4. Furthermore, the evidence permitted a finding of other offensive conduct by respondent during the Majorca trip. The board, while finding evidence of such conduct, found it to be "equally balanced, as to whether respondent's conduct was

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excessive" or "essentially different from that of the ordinary person, including members of the judiciary, under similar circumstances." However, a judge is charged with the responsibility of conforming to a higher standard of personal behavior than the ordinary person. A judge's conduct of personal behavior must be "beyond reproach." Improper conduct which may be overlooked when committed by the ordinary person, or even a lawyer, cannot be overlooked when committed by a judge. By accepting his office, a judge undertakes to conduct himself in both his official and personal behavior in accordance with the highest standard that society can expect. As stated in Canon 34, "In every particular his conduct should be above reproach."

Respondent also admitted employing both his son and his daughter as charged by Count 11. Canon 12 provides that a judge should "avoid nepotism and undue favoritism in his appointments." The board, although finding this to be technically nepotism, found that it "did not amount to an intentional exploitation of nepotism."

Respondent contends further that the board should have proceeded pursuant to Gov. R. VI, rather than Gov. [222] R. V. Gov. R. VI relates to proceedings for removal of judges, whereas Gov. R. V. relates to the disciplining of members of the legal profession of Ohio. They are not mutually exclusive. A member of the legal profession, who is also a judge, may engage in misconduct which not only requires his removal from office, but also requires that disciplinary action be taken against him with regard to his right to practice law after such removal from office. Gov. R. V expressly provides that disciplinary action may be instituted against a member of the legal profession for violation of the Canons of Judicial Ethics while such member of the legal profession holds the office of judge.

This court previously considered the matter and held, in paragraphs five and six of the syllabus of *Mahoning County Bar Assn. v. Franko* (1958), 168 Ohio St. 17, that:

> "5. Judges who are required by statute to be attorneys at law must necessarily maintain their status as members of the legal profession, and the Supreme Court of Ohio, by virtue of its inherent power with reference to the disciplining of members of such profession, may provide by rule the basis for and the procedure to be followed in the disciplining of such members who hold judicial positions.
>
> "6. The Canons of Judicial Ethics, as adopted by and made a rule of the Supreme Court of Ohio, provide a basis for the disciplining of members of the legal profession who hold judicial positions, and a breach thereof subjects such a member of the legal profession to disciplinary action according to the procedure set out in Rule XXVII of such court."

Respondent contends that since R. C. 2701.12 and Gov. R. VI were adopted subsequent to *Franko*, these constitute the exclusive method for disciplinary action against a member of the legal profession who is a judge for misconduct in office. We reject this contention. R. C. 2701.12 and Gov. R. VI do provide procedure for removal of a judge from office. Gov. R. V, on the other hand, does not pertain to the removal of judges from office, although proceedings under that rule may result in disqualification of a judge **[223]** because he is required to be a lawyer. See *State, ex rel. Saxbe v. Franko* (1958), 168 Ohio St. 338.

Gov. R. V(4) provides that:

> "* * * all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law and

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judges; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension for an indefinite period or disbarred from the practice of law, and judges; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. * * *" Gov. R. V(5)(a) defines misconduct as:

"* * * any violation of any provision of the oath of office taken upon admission to the practice of law in this state, or any violation of the Code of Professional Responsibility or the Canons of Judicial Ethics as adopted by the court from time to time, disobedience of these rules or of the terms of an order imposing a suspension for an indefinite period from the practice of law, or the commission or conviction of a crime involving moral turpitude. * * *"

While it might be a more logical procedure, in cases of lawyers who are judges, to first proceed under Gov. R. VI for removal from office, and then proceed under Gov. R. V with respect to disciplinary action as a member of the legal profession, we find no error or prejudice to respondent in proceeding first with proceedings pursuant to Gov. R. V. This is especially true in this case, since the respondent at the outset of the filing of the complaint, requested that the proceedings be pursuant to Gov. R. V (then Rule XVIII of the Rules of Practice). The supplemental complaint alleged that respondent utilized improper methods in attempting to influence the proceedings to be pursuant to Rule XVIII (now Gov. R. V) rather than Rule XXI (now Gov. R. VI). Respondent, in his answer thereto, stated that "respondent admits that through his counsel by invitation he * * * did suggest that all interests were best served in the disposition of this cause if pro-

ceedings were [224] governed by Rule XVIII." Respondent cannot now be heard to complain that his "suggestion" was followed. The evidence received by the hearing panel also indicates that this was the desire of the respondent. Accordingly, respondent's motions to dismiss and to quash are overruled.

We now turn to consideration of the findings of the board. The finding of the board that the respondent's personal behavior in his everyday life, while a judge, gave the appearance of impropriety and was not beyond reproach (Count 1) and constituted a violation of Canon 4, is supported by, and required by, the evidence.

The board's finding that respondent violated Canons 13, 25 and 34 in connection with his business association with the Harmony Loan Company is also supported and required by the evidence. Respondent contends that he has not violated Canon 25 because other judges in Ohio also serve on boards of directors of savings and loan associations.

Canon 25 of the Canons of Judicial Ethics, as adopted by the then members of this court on January 27, 1954 (160 Ohio St.), differs from Canon 25 as adopted by the American Bar Association. Canon 25 provides that:

> "A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, [n]or use the power of his office [or the influence of his name] to promote the business interests of others; he should not solicit for

charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties."

The foregoing quoted language, in brackets, is included in Canon 25 as adopted by the American Bar Association but is not included in Canon 25 as adopted by this [225] court in 1954. That court, by omitting the language in brackets from American Bar Canon 25, seemingly intended to give judges greater latitude in their business relationships than would be permitted by the American Bar Canon. In view thereof, it would appear that a judge does not necessarily violate Canon 25, as adopted in Ohio, *merely by serving* as a member of the board of directors of a loan company or a savings and loan association, where he in good faith discharges his duties as a director and nothing more is involved.*

If the fact of a judge's membership on the board of directors is used by the corporation to persuade others to patronize it or is used by the corporation to promote its business interests, the judge, by accepting membership on the board of directors, has given ground for "reasonable

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* The additional language explains the conclusion to the contrary in Opinion 254 of the Committee on Professional Ethics and Grievances of the American Bar Association. The Committee on Legal Ethics and Professional Conduct of the Ohio Bar Association apparently did not take cognizance of the difference in language between Canon 25 as adopted for Ohio, and that as adopted by the American Bar Association, in its Opinion No. 19, which was reaffirmed and reported in the October 23, 1972, issue of Ohio Bar (XLV Ohio Bar No. 41, page 1423). *Whether this will continue to be the rule for conduct of judges depends upon the action of this court in its consideration of the new Code of Judicial Conduct adopted by the American Bar Association, Canon 4 of which expressly prohibits a judge from serving as an officer, director, employee or advisor of any business organization.*

suspicion" that the judge is using "the power or prestige of his office" for that purpose. This is especially true if the judge does not regularly attend meetings of the board of directors, but is a member of the board in name only.

Even if under the Ohio Canon 25, respondent could serve as a member of the instant board of directors, he violated Canon 25 when Harmony Loan misused the fact of his membership. When he accepted membership on that board he undertook the affirmative duty to make certain that there would be no misuse made by Harmony of that membership.

[226] Canon 13 provides in part, that a judge "should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor."

Canon 33 provides, in part, that a judge should "in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct."

Count 8 alleges that:

> "On the board of directors of Harmony Loan Company have been Joseph Becker, bailiff for Judge Heitzler in both courts, and Robert Stone, a Cincinnati attorney who is a personal friend of Judge Heitzler, who appears with some frequency before Judge Heitzler, and frequently has lunch in a public restaurant with Judge Heitzler.
>
> "James J. Matthews, president of Harmony Loan Company, was treasurer of Judge Heitzler's campaign in 1968 for the Court of Domestic Relations.

"Ralph Crisci, chief referee in Domestic Relations Court, was at one time assistant vice president and attorney for Harmony Loan Company.

"Sylvan Reisenfield, attorney for Harmony Loan Company, appears in the Domestic Relations Court before Judge Heitzler.

"Harmony Loan Company has from time to time issued brochures which contain the pictures and identifying names of its directors and officers, including Joseph Becker, Robert Stone and James Matthews, and Judge Heitzler.

"Relator says that in knowingly associating with Harmony Loan Company and its officers and directors and in permitting the publicity of his name as a judge in connection with the business of Harmony Loan Company, Judge Heitzler has violated Judicial Canons 13, 25, 33, and 34."

Respondent, as his answer to said count, stated that he "admits the allegations contained in paragraph 8 of said complaint and certificate filed herein, but specially [227] and specifically denies that he violated any Canon of Judicial Ethics." This admission, together with the evidence presented at the hearing, fully justifies a finding of misconduct by respondent in connection with his association with Harmony Loan Company.

Count 9 alleges misconduct by respondent in his handling of numerous cases in which Harmony Loan Company was a party while he was a judge of the Cincinnati Municipal Court. Respondent admitted handling such cases at a time when he was both a director of the company and an investor therein.

Canon 26 provides, in part, that "where he has a personal investment in an enterprise involved in litigation

in the court, he should disqualify himself from acting in such litigation unless the interest is so slight that he does not believe it could affect the impartial performance of his official duties and the parties to such litigation are so informed and do not object."

Canon 29 provides, in part, that "a judge should abstain from performing or taking part in any judicial act in which his personal interests are involved."

Respondent contends that since the evidence indicates that he tried no "contested" case involving the Harmony Loan Company, and since the acts involved occurred during a prior term of office as judge of a different court, that he cannot now be charged with misconduct with regard thereto.

The evidence does not indicate that respondent heard any "contested" cases involving Harmony Loan Company, nor does it indicate that respondent disqualified himself from handling such cases. Respondent granted numerous default judgments and confessed judgments to Harmony Loan Company while a judge of Cincinnati Municipal Court at a time when he had a substantial investment in said company and was a director thereof. Respondent also signed garnishment orders, continuances, dismissals, and ruled upon some motions.

The granting of a default judgment or a confessed [228] judgment necessarily involves a judicial determination of whether the plaintiff is entitled thereto. The granting of a default or confessed judgment to an enterprise in which a judge has a personal investment constitutes acting in litigation involving such enterprise, in violation of Canon 26. Even where the judge's interest is so slight that it could not affect the impartial performance of his official duties, the judge cannot so advise the

adverse parties, nor do they have any opportunity to object, where the judgment is entered by default or confession. Furthermore, in view of the numerous cases involving Harmony Loan Company in which respondent performed judicial acts, there is no possibility that his actions were the result of oversight.

In support of his position, respondent relies upon authority to the effect that a default judgment granted by an interested judge does not render such judgment void or subject to collateral attack in the absence of fraud. See *Ashland Bank & Savings Co. v. Houseman* (1915), 5 Ohio App. 165. However, that has no bearing upon the propriety or ethical considerations of a judge so acting.

Respondent contends further that most of the cases in which he acted were first heard by a referee. However, the remainder of the cases were not so heard. Furthermore, assuming the cases were first heard by a referee and then the entry of judgment was signed by respondent, respondent took no precaution to prevent the appearance of impropriety in connection therewith, which the Canons of Judicial Ethics require of him.

In support of his contention that misconduct during a previous term cannot now be considered, respondent relies upon *State, ex rel. Vogt, v. Donahey* (1923), 108 Ohio St. 440; *McMillen v. Diehl* (1934), 128 Ohio St. 212; and *State, ex rel. Stokes, v. Probate Court* (1970), 22 Ohio St. 2d 120, all of which hold that, under the applicable statutes, an officer cannot be removed from office for misconduct during a previous term of office. However, it is pointed out in *Stokes* that this is not the result where a statute specifically provides for disqualification or removal for misconduct **[229]** during a previous term, citing *In re Coppola* (1951), 155 Ohio St. 329, wherein it is stated, at page 332:

> "* * * the General Assembly has the power to require reasonable qualifications for office and if a statute provides that misfeasance and malfeasance during a previous term shall be a ground for the removal of a public official during his existing term, such a statute must be given effect."

R. C. 2701.12 specifically provides that a violation of the Canons of Judicial Ethics by a judge "since first elected or appointed to judicial office" constitutes cause for removal of such judge from office.

Furthermore, as pointed out above, this is not a removal-from-office proceeding, although it may indirectly have that effect. Rather, this proceeding is a disciplinary action against a member of the legal profession, who is a judge, and will result in disciplinary action against respondent as a member of the legal profession. As stated in the second paragraph of the syllabus of *Mahoning County Bar Assn. v. Franko* (1958), 168 Ohio St. 17:

> "The legal profession of Ohio includes every person who has been admitted to the practice of law in this state, by and under the rules for admittance thereto as adopted by the Supreme Court of Ohio, whose name is maintained on the Roll of Attorneys kept by such court, regardless of the subsequent capacity or status of such person."

There is no doubt that respondent was a member of the legal profession at the time involved, and continues to be, and it is that status which is the subject of this proceeding. Thus, the misconduct alleged occurred while respondent was a member of the legal profession of Ohio, regardless of whether it occurred during his existing, or a previous, term of office as a judge.

The evidence clearly supports the finding of the board that respondent violated the Canons of Judicial Ethics by handling numerous cases in which Harmony Loan Company was a party, at a time when he was a director of, and had a substantial investment in, said company.

[230] As to Count 10, respondent admitted that he hired as a constable a man with a lengthy criminal record, knowing of such record. Canon 12 provides, in part, that "trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage." Canon 34 provides, in part, that a judge should "deal with his appointments as a public trust."

Respondent contends that these canons are not applicable to the employee in question because he was a "glorified usher" or "go for," being one who "fetches" the parties and their attorneys when it is time for their appearance. The employee was hired as a constable. Respondent described his duties as "to schedule various cases in before the various referees at the proper time." Respondent testified further with respect to this constable's duties that he "was to stand out in the hall and a list of the various hearings before the referees was furnished him. He would pull the folders and then as the respective attorneys came in with their clients ready to go on a case on preliminary motions and so forth, escort them into the various referee hearing rooms and come out. In the event he could not get cases or one referee was tied up in a rather lengthy case, then he would get another referee and shift cases around." We find that Canon 12 does apply to a constable with such duties

Respondent also attempts to justify employment of this constable with a criminal record, on the grounds of rehabilitation, and testified that the practice followed by Hamilton County offices in the employment of persons with criminal records has been "if the man has paid his debt to society to give him a chance and put him to work." We agree with the board that such rehabilitation should have been attempted by some means other than employment as a constable in Domestic Relations Court. Respondent testified **[231]** further that the employee with the criminal record had assisted him in his "most recent campaign for Domestic Relations Judge, and one or two of the prior campaigns for Municipal Court."

Canon 12 requires that persons employed to aid in the administration of justice should have the strictest probity and should be selected with a view solely to their character and fitness. Obviously, employees with criminal records employed for the purpose of aiding in their rehabilitation have not been "selected with a view solely to their character and fitness." "Probity" means "unimpeachable integrity." Obviously, a person with a lengthy criminal record, including one felony conviction for burglary, is not possessed of the strictest probity. Respondent completely ignored Canon 12 with respect to this employment.

Evidence was received that the employee in question solicited bribes from at least two persons, one of which was allegedly paid. When the person, from whom the bribe not paid was solicited, advised respondent of the solicitation, respondent did not immediately discharge the employee in question, but retained him as an employee until the advent of newspaper publicity concerning the alleged bribe attempt. The only investigation respondent made was to ask the employee in question, and

respondent stated: "I kept him on because I had no evidence whatsoever that he had done anything wrong." This was apparently predicated upon the failure of the person reporting the solicitation for a bribe to produce for respondent a tape recording of the bribe solicitation. Respondent stated that: "* * * when he was suspended, he was first suspended when portions of an excerpt from a so-called tape appeared in the paper and he was linked to that and he was suspended without pay. * * *"

The finding by the board of misconduct by respondent in the hiring and retaining of the employee with a criminal record is fully supported by the evidence.

Respondent contends also that "even if the findings of fact by a board of commissioners are supported by the [232] evidence and confirmed by the Supreme Court of Ohio, the recommendations of the board of commissioners as to the disciplinary action to be administered are too severe for the violations proven under the circumstances."

The facts of this case clearly indicate either that respondent has little or no concept of the ethical behavior required of a judge by the Canons of Judicial Ethics in both his personal and official conduct or that he has such concept, but thinks so little of it that he disregards it completely. As stated in the opinion in *Franko, supra,* at page 36: "Either attitude toward ethics from an attorney at law undeniably would be reprehensible—from an attorney at law who has assumed a judgeship it is inexcusable." Misconduct by a lawyer who is a judge brings even greater discredit upon the legal profession than the same misconduct if performed by a lawyer who has not been entrusted with that high office. The board found that respondent by his conduct has violated Canons 4, 12, 13, 25, 26, 29, 33 and 34 of the Canons of Judicial Ethics.

Having carefully reviewed and considered the entire record, and the objections of the respondent and the briefs submitted, we conclude that the findings of the Board of Commissioners on Grievances and Discipline are fully supported by the evidence, and such findings are therefore affirmed. The objections to such findings and to the recommendations of the board are overruled. The recommendation of the board that respondent be indefinitely suspended from the practice of law is confirmed, and such discipline is hereby imposed.

Judgment accordingly.

O'NEILL, C. J., WHITESIDE, HERBERT, CORRIGAN, STERN, LEACH and BROWN, JJ., concur.

WHITESIDE, J., of the Tenth Appellate District, sitting for SCHNEIDER, J.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1972

No. 72-1091

GEORGE S. HEITZLER, JR.,
Petitioner,

v.

THE HONORABLES C. WILLIAM O'NEILL,
Chief Justice, et als.,
Respondents.

PETITIONER'S REPLY MEMORANDUM AND SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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Chief Justice, et als.,
Respondents.

THE CASE IS NOT MOOT NOR WAS THE SIXTH CIRCUIT'S DISMISSAL CORRECT IN ANY RESPECT

Respondents contend at p. 5 of their Brief In Opposition to the Petition for Certiorari that since the Supreme Court of Ohio has completed the disciplinary proceedings against Judge Heitzler that the case is moot. Petitioner submits that because he can apply for reinstatement in the practice of law at the end of two years, and because the Supreme Court of Ohio may deny Petitioner's request for reinstatement, and

because the Rules for the Government of the Bar of Ohio will in any event, remain in full force and effect in the interim subjecting other members of the Ohio Judiciary and Bar to similar constitutional and civil rights deprivations, it is by no means,

> ". . . absolute[ly] clear that the alleged wrongful behavior could not reasonably be expected to recur." *Johnson* v. *New York State Education Department*, ... U. S. ....., 93 S.Ct. ....., 34 L.Ed. 2d 290, 293 (1972) Concurring opinion per Justice Marshall.

See also: *United States* v. *Concentrated Phosphate Export Association*, 393 U. S. 199, 203, 89 S.Ct. 361, 21 L.Ed. 2d 344 (1968); *Indiana Employment Division* v. *Burney*, ... U. S. ..... 93 S.Ct. ....., 35 L.Ed. 2d 62, 65 (1973). The case is therefore not moot. Furthermore, the "collateral consequences"[1] of reinstatement under Gov. R. V alone are sufficient to negate any suggestion of mootness. *Sibron* v. *New York*, 392 U. S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917 (1968).

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[1] While Judge Heitzler's suspension is in effect the Board of Commissioners on Grievances and Discipline is empowered to: (1) investigate any complaints made against one subject to an indefinite suspension Gov. R. V (2) (a); (2) generally conduct an investigation and take evidence relating to a petition for reinstatement Gov. R. V (2) (b), and Gov. R. V (25); and (3) investigate and take evidence relating to any alleged contempt of any order issued by the Supreme Court of Ohio Gov. R. V (2) (d). . . .

Judge Heitzler can next petition for reinstatement two years after the date of the entry of the order indefinitely suspending him and if this is denied, another two years must elapse before reinstatement can again be sought, Gov. R. V (21). Petitioner's past record during reinstatement proceedings is open to scrutiny and additional evaluation. Gov. R. V (22). Any unpaid costs must be paid as a prerequisite to any reinstatement effort, Gov. R. V (23), and the Reinstatement inquiry is open to the obvious discretion of whether the petitioner is now possessed with "all of the qualifications, mental, educational, and moral . . . ." that are required. Gov. R. V (24). A new hearing must be held and more testimony taken. Gov. R. V (25), (26). The Supreme Court of Ohio finally rules on the merits of the petition for reinstatement. Gov. R. V (26).

Assuming even *arguendo*, the case could be moot, the proper course would be to remand the case to the Sixth Circuit with directions to remand it to the United States District Court for the Northern District of Ohio to ascertain if the case is in fact, moot, *Johnson* v. *New York State Education Department*, ... U. S. ....., 93 S.Ct. ....., 34 L.Ed. 2d 290, 291 (1972); *Indiana Employment Division* v. *Burney*, ... U. S. ....., 93 S.Ct. ....., 35 L.Ed. 2d 62, 63 (1973); *Dillard* v. *Industrial Commission* ..... U. S. ....., 93 S.Ct. ....., 34 L.Ed. 2d 444 (1972) or in the alternative to remand the case to the District Court and permit Petitioner to amend his complaint.

As to the merits of the district court's jurisdiction, Respondents brief entirely ignores the Sixth Circuits' holding in *Taylor* v. *Kentucky Bar Association*, 424 F. 2d 478 (6th Cir. 1970) and the opinion on remand *granting* to the district court jurisdiction in a federal civil rights case under 42 U. S. C. §1983. As already discussed, *Erdmann* v. *Stevens*, 458, F.2d 1205 (2nd Cir. 1972) certiorari denied 93 S.Ct. 126 (1972) *supports* the jurisdiction of the federal district court. (Petition at pp. 26-27).

PETITIONER'S FIRST AND FOURTEENTH AMENDMENT CLAIMS ARE SUBSTANTIAL

Respondent characterizes Petitioners' First and Fourteenth Amendment claims as "anemic" (Brief pp. 5-6). To the contrary, reference to Respondent's own Appendix, (pp. A-14-15) wherein the Opinion of the Supreme Court of Ohio is set out clearly notes that Petitioner not only alleged that his First and Fourteenth Amendment rights were infringed (Pet. App.

pp. A-17, A-25, 26), but the Supreme Court of Ohio based its very holding on those associations Judge Heitzler claims are protected by the First and Fourteenth Amendments (Resp. App. A-14-15). The ultimate restriction upon Judge Heitzler's conduct as embodied in the Opinion of the Supreme Court of Ohio sweeps almost as broad as the unnecessary restriction on the First and Fourteenth Amendment rights presented in the recent Civil Rights case of *Lynch* v. *Snepp*, 350 F. Supp. 1134, 1139 (W. D., N. C., Char. Div. 1972) wherein the court held that:

> " 'Our federalism' (Younger v. Harris, 401 U. S. 37, 91 S.Ct. 746, 27 L.Ed.2d 699 (1971) provides a dual system of state and federal servants. Comity, a judicial doctrine, contemplates that federal and state courts respect each other's opinions and problems. This minimizes conflicts. It is everyday courtesy. *The United States Constitution, the supreme law of the land, values human freedom more than judicial courtesy, and requires that all state and federal judges respect the Bill of Rights, including rights of free speech and expression. Abstention, comity, and federalism are not valid reasons, on this record, for shirking this court's duty to investigate and protect against the alleged serious threats to constitutional freedom.* The case should be decided on its merits." (Emphasis added.)

The instant case, like *Lynch* should be decided on the merits.

THE SIXTH CIRCUIT ERRED IN DISMISSING PETITONER'S CASE

The Respondent in the instant case in its Brief entirely ignores the recent unanimous pronouncement by this Court in *American Trial Lawyers Association v. New Jersey Supreme Court*, ... U. S. ....., 93 S.Ct. ....., 34 L.Ed. 2d 651 (January 15, 1973) concerning postponement and retention of federal jurisdiction in an abstention situation *rather than a dismissal.* "The proper course is for the District Court to *retain* jurisdiction pending the proceedings in the state courts." (Emphasis added.) 34 L.Ed. 2d 651, 653. The Court of Appeals thus erred in ordering the District Court to dismiss the case.

Petitioner again submits that the venue was in fact proper under 28 U.S.C. §1392 (a) and the Court is respectfully referred to the Petition (pp. 30-32) for the authorities and arguments presented there.

THE SIXTH CIRCUIT FILED THEIR *PER CURIAM* OPINION ON NOVEMBER 10, 1972, WITHOUT NOTICE OR ORAL ARGUMENT, OR BRIEF DIRECTED TO THE PROPRIETY OR LACK OF IT CONCERNING THE PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION.

Respondents, in the Counterstatement of Case at p. 3 of their Brief in Opposition state that the Sixth Circuit's Order ". . . was entered only after it had had an opportunity to review Petitioner's extensive brief." Petitioner again submits that the Sixth Circuit filed their *Per Curiam* opinion of November 10, 1972 without notice, without oral argument, and without a brief

directed to the propriety or lack of it concerning the Petition for Writ of Mandamus and/or Prohibition.

As the record will readily verify, Petitioner filed in the Sixth Circuit a Motion and Brief in support thereof to dissolve, vacate, dismiss or modify the *Stay Order* previously entered by the Sixth Circuit. Petitioners Motion was made *primarily* to secure the stay, not with a view toward the propriety or lack of it concerning the Petition for Writ of Mandamus and/or Prohibition itself although the brief did summarily state that the Anti-Injunction Act was not applicable. (See Petition pp. 10, 11).

CONCLUSION

For the reasons embodied in the Petition and those set out in this Reply Memorandum, the Writ of Certiorari should be granted.

Dated: March 23, 1973.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Reply Memorandum and Supplemental Appendix upon Victor E. DeMarco, Esquire, Jones, Day, Cockley & Reavis, 1750 Union Commerce Building, Cleveland, Ohio, 44115, Attorneys for Respondent, and upon the Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, at Cleveland, United States Court House, Cleveland, Ohio 44114, and upon the Solicitor General, Department of Justice, Washington, D. C. 20530, by depositing same in the United States mail, postage prepaid, air mail, this 23 day of March, 1973.

Stanley E. Preiser

STANLEY E. PREISER
Of Counsel for Petitioner

SUPPLEMENTAL APPENDIX

Page

1. Opinion, *Burks* v. *Perk*, United States Court of Appeals for the Sixth Circuit, ___ F.2d ___ (November 17, 1972) ....SA-2 to SA-6

2. Opinion, *In re*: *Petition for Reinstatement of John Ruffalo, Jr.* On Certified Report by the Board of Commissioners on Grievances and Discipline..... SA-6

This Supplemental Appendix contains the opinions in the *Burks* v. *Perk* decision and the opinion in the reinstatement petition of John Ruffalo. The *Burks* v. *Perk* decision is cited in Judge Heitzler's Petition for Writ of Certiorari at pp. . . . 24, 29 at n. 1. The *Ruffalo* decision denying John Ruffalo reinstatement to practice is cited in Judge Heitzler's Petition for Writ of Certiorari at p. 24.

These opinions were unavailable to Petitioner's counsel as of February 8, 1973 and are now respectfully submitted for their consideration by this Honorable Court.

No. 72-1368

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WALTER A. BURKS, JR., ET AL.,
Plaintiffs-Appellees,
v.
RALPH PERK, Mayor of the City of Cleveland, Ohio,
Defendant-Appellant.

APPEAL from United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed November 17, 1972.

Before PHILLIPS, Chief Judge, WEICK, Circuit Judge, and BRATCHER*, District Judge.

PER CURIAM. Ralph Perk, Mayor of the City of Cleveland, Ohio, has appealed from an order of the District Court restraining and enjoining him from conducting a hearing on written charges of neglect of duty and malfeasance in office, which charges were made against five members of the Civil Service Commission of the City.

The written charges specified the acts of neglect of duty and malfeasance in office, gave to each Commis-

* The Honorable Rhodes Bratcher, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

sioner more than ten days' notice of the time and place of a public hearing thereon before the Mayor, and stated that each Commissioner would have opportunity to be heard in person and by counsel and to present evidence in his defense.

Instead of resisting the charges at a hearing before the Mayor, who had the power of appointment as well as removal for cause, under the City Charter, the Commissioners joined in filing in the District Court a complaint against the Mayor seeking to enjoin even the hearing, and alleging that there is a conflict between a state statute and the City Charter; that no judicial review of the Mayor's decision is available in the state; that the Mayor is biased; that the charges are not sufficiently specific; and that the procedure of the City Charter violates the due process clause of the Fourteenth Amendment.

Jurisdiction of the Court was founded on 28 U.S.C. §§ 1331, 1343 and 1983.

On plaintiffs' motion for a temporary restraining order the District Court heard arguments of counsel but took no evidence. Following the hearing the Court filed a written memorandum and order in which it did not determine any issues of state law, but suggested that plaintiffs file an action for declaratory judgment in the state court, (which they later did), and issued a preliminary injunction restraining the Mayor from conducting any hearing while the state issues were being determined in the state court. The District Court reserved for itself the determination of the federal questions raised. The District Court has thus bifurcated the case, with one part pending in the Com-

mon Pleas Court, and another part in the District Court, and has prevented the Mayor from conducting any hearing on the charges.

In our opinion the Mayor had full power and authority to hear and determine the charges against the Commissioners under Section 124 of the Charter of the City of Cleveland, which provides as follows:

> "A member of the civil service commission may be removed by the mayor for neglect of duty, incapacity, incompetency, or malfeasance in office, but only after opportunity has been given for a public hearing before the mayor, to be held at least ten days after written charges have been made and notice thereof been given to the accused member. Such member shall be heard in person or by counsel; and such removal shall be final."

Contrary to the claim of appellees, a judicial review of a final decision of the Mayor is expressly provided by Section 2506.01, Ohio Revised Code (Supp.), as follows:

> "Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in section 2505.01 to 2505.45, inclusive of the Revised Code, and as such procedure is modified by section 2506.01 to 2506.04, inclusive of the Revised Code."

By virtue of this statute the Commissioners could have obtained a judicial review of any final decision

of the Mayor, in the Common Pleas Court of Cuyahoga County.

The Common Pleas Court in Ohio, unlike the United States District Court, which is a court of limited jurisdiction, is a court of general jurisdiction. If it became necessary to restrain enforcement of an adverse decision of the Mayor pending review, the Common Pleas Court had full power and authority to enjoin such enforcement. The Commissioners thus had an adequate remedy under state law. They ought not be permitted to frustrate state procedures by resorting to Federal Courts in the first instance. No irreparable injury to plaintiffs has been alleged or shown.

The Commissioners do not have a constitutional right to public employment. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961); *Orr* v. *Trinter*, 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

Public office is not property within the meaning of the Fourteenth Amendment. *Taylor & Marshall* v. *Beckham*, 178 U.S. 548 (1900).

In *Wilson* v. *North Carolina*, 169 U.S. 586 (1898), the Court held that the removal of a railroad commissioner by the Governor of a state which by statute had vested in him the power of appointment and removal, did not deprive the commissioner of his property without due process of law.

But even if the Commissioners in the present case had a property interest in their offices, the provisions for notice and hearing on removal charges provided in

the City Charter, and the right of review by the state courts, would seem to comply with due process requirements. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

Federal Courts ought not intrude in controversies between state political subdivisions and their officers, over the title to a state office or the rights of persons appointed to such office. We ought not strain unnecessarily the relationship between federal-state judicial systems.

The judgment of the District Court is reversed; the injunction is dissolved; and the cause is remanded to the District Court with instructions to dismiss the complaint.

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45 Ohio Bar 1654

DISCIPLINARY DOCKET DECISION: DD 57. In re: Petition for Reinstatement of John Ruffalo, Jr. (December 4, 1972)

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE.

On Petition for Reinstatement. Report confirmed and reinstatement denied.

FILE COPY

Supreme Court, U. S.
FILED
APR 16 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

October Term, 1972

No. 72-1091

GEORGE S. HEITZLER, JR.,
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v.

THE HONORABLES C. WILLIAM O'NEILL,
Chief Justice, et als.,
Respondents.

SUPPLEMENTAL MEMORANDUM

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Respondents.

WITHDRAWAL OF RELIANCE UPON *LYNCH v. SNEPP*, 350 F. SUPP. 1134 (W. D., N. C. CHAR. DIV. 1972)

In Petitioner's Reply Memorandum and Supplemental Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the 6th Circuit, filed in your office March 24, 1973, reliance was placed upon *Lynch* v. *Snepp*, 350 F. Supp. 1134 (W. D., N. C., Char. Div. 1972).

Receipt in today's mail of Volume 472, F. 2d No. 2, April 2, 1973, pp. 513-1072, discloses that *Lynch* v. *Snepp*, 472 F. 2d 769 (4th Cir. 1973) has been reversed.

Therefore, that sentence of the Reply Memorandum in which reliance upon *Lynch* v. *Snepp* is placed is respectfully withdrawn.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Supplemental Memorandum upon Victor E. DeMarco, Esquire, Jones, Day, Cockley & Reavis, 1750 Union Commerce Building, Cleveland, Ohio 44115, Attorneys for Respondent, and upon the Honorable Frank J. Battisti, Chief Judge of the United States District Court for the Northern District of Ohio, at Cleveland, United States Court House, Cleveland, Ohio 44114, and upon the Solicitor General, Department of Justice, Washington, D. C. 20530, by depositing same in the United States mail, postage prepaid, air mail, this 14th day of April, 1973.

Stanley E. Preiser

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Of Counsel for Petitioner